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Outcome of Copenhagen Process on detainees in international military operations undermines respect for human rights

On 20 October 2012, the Foreign Ministry of Denmark announced that a group of two dozen states meeting in private in Copenhagen had adopted a set of “Principles and Guidelines” under the “Copenhagen Process on the handling of detainees in international military operations”.¹ The Principles and Guidelines purport to apply to non-international armed conflicts and peace operations.

Over the five years since the launch of the process in October 2007, the contents of the discussions and the identities of the participants have been kept remarkably secret. One might have expected the United Nations would be the natural venue for ‘global’ standard-setting on the subject of detainees and international military operations. However, Denmark deliberately convened the discussions outside of any established international organisation precisely in order to retain the ability to exclude certain states and civil society.

Indeed, non-governmental organisations with a long track record of protection of human rights, such as Amnesty International, had been completely excluded from the process for those five years. On 17 September 2012, Amnesty International was invited to a brief meeting with the Danish Foreign Ministry scheduled for the morning of 16 October; only late the afternoon of 10 October was anything revealed to the invitees about what states were specifically proposing. And the 16 October meeting came a mere 48 hours before the final negotiating session on 18-19 October (from which Amnesty International and other civil society organisations were again excluded).

The lack of meaningful consultation of international human rights organisations should be particularly surprising given the global scope and fundamental importance of the very real challenges that the Copenhagen Process purported to address.

For instance, imagine that troops from a European country enter a house in Afghanistan and bring a man they suspect of associating with the Taliban back to their base, where they keep him against his will for several days. The Afghan National Directorate of Security (NDS) finds out and arrives at the base asking that the

¹ <http://um.dk/da/nyheder-fra-udenrigsministeriet/newsdisplaypage/?newsID=8FDF325A-AEFA-473B-A62B-FCC630EE0A64> (accessed 22 October 2012).

detainee be handed over to them. But the NDS is known routinely to torture such detainees, and transferring a person to a risk of such abuse clearly violates absolute obligations under international law.

Imagine a request is also received from a US special operations commander who says this person is of interest to them and they would like to “borrow” him for a few weeks or months of interrogation in a place whose existence and location is secret, the man held incommunicado. The situation being described though appears to constitute an enforced disappearance; like torture, enforced disappearance and any other form of secret detention is absolutely prohibited by international law.

Or consider a similar scenario playing out between Ethiopian and Kenyan troops capturing suspected insurgents in Somalia, perhaps adding to the mix some Ugandan troops sent under the aegis of an African Union peacekeeping mission.

Situations similar to those described above are not purely hypothetical; they have arisen frequently in practice. Such situations can throw into relief that different states in such joint operations can be subject to different sets of treaty obligations. Further, they can differ greatly in their interpretations of their obligations even under the same treaty or the universal rules of customary international law. States generally desire to maximize their ability to cooperate and to minimize the cost and complication of their own operations, differing views on human rights protections seem to have come to be seen by some states as an inconvenient and unnecessary burden on their military cooperation.

The situation is further exacerbated by the outright refusal of some states, despite clear rulings by the International Court of Justice and affirmations by a wide range of United Nations experts over several decades, to accept that states remain bound by their human rights obligations in situations of armed conflict, including in respect of acts states commit outside their territory. At the same time, a small number of states invoke the laws of war in a far wider range of circumstances than conventional understandings of international law would allow.

The impact of these otherwise aberrant views is amplified however by the fact that among their strongest proponents is the United States of America. Particularly in relation to its theory of “global war” against al-Qa’ida and a vague, sometimes shadowy range of “associated” entities, the USA continues to invoke the laws of war to the exclusion of human rights law. By doing so, it seeks to justify more than a decade of denial of key human rights protections to detainees taken into custody far from any battlefield and only distantly related, if at all, to any actual fighting.

Deep differences can emerge even between allies as close as the United Kingdom and the United States of America. The UK has ratified the 1977 Additional Protocol II (on non-international armed conflicts) to the 1949 Geneva Conventions, and the European Court of Human Rights has held the European Convention on Human Rights to apply to detainees held by the UK in Iraq. The USA by contrast has not ratified Protocol II and denies that its human rights obligations, particularly those under the International Covenant on Civil and Political Rights, apply at all to detainees outside of its borders (or indeed to military detainees within its borders).

Amnesty International considers that states have clear options that would permit them to participate in joint military operations where such differences arise. States wishing

to cooperate in those aspects of operations that may give rise to shared responsibility for detainees could choose to harmonize their operating rules upwards, to ensure their joint actions comply with the most protective set of international human rights and humanitarian law obligations to which any one state among them is subject. Or states that cannot win agreement to such harmonization could choose to retain full responsibility for those they deprive of liberty, rather than risk violating their own obligations by transferring them to states that provide lesser protection against abuse (or indeed to states that could be positively expected to violate the detainee's rights).

The "Copenhagen Process Principles and Guidelines" announced on 20 October do not however reflect either of these legitimate options. Instead, the Copenhagen Principles can be read as allowing for a lowering of standards to a kind of muddled compromise, in several respects falling well below even the "lowest common denominator" among participating states. One important value that has been traded away in this process is full recognition and respect for states' specific human rights obligations.

Examples of the failings include the following:

- The Principles do not explicitly recognise and affirm the application of international human rights law and standards in situations of non-international armed conflict and peace operations.
- The Principles do not acknowledge the absolute prohibition of enforced disappearance and other forms of secret detention under international law. This is especially of concern given that the Principles would allow states not to inform family members of the fate and whereabouts of a detainee, in circumstances that the Principles do not define or limit in time.
- The Principles appear to endorse indefinite administrative detention on security grounds, without providing for the safeguards identified as essential by the UN Human Rights Committee – including for instance, the right to challenge the lawfulness of detention before a court.
- The Principles seem to allow for indefinite detention of persons suspected of having committed criminal offences, without recognising the basic right to trial within a reasonable time or release.
- The Principles do not recognise that complaints of torture or other cruel, inhuman or degrading treatment must be investigated by independent and impartial authorities, that victims of such abuses have the right to an effective remedy, and that those responsible for such abuses must be brought to justice.

Given the extent to which they pander to existing poor practices rather than encouraging states to better comply with already-established standards, the Copenhagen Principles are unlikely actually to result in the better fulfilment of human rights obligations in situations of armed conflict and peacekeeping operations. To the contrary, Amnesty International fears, based on its decades of research and advocacy on such issues, that the Principles are ripe for exploitation by some states in an effort to reinterpret or otherwise avoid their obligations under international humanitarian and human rights law, in ways that could fundamentally undermine the effective protection of human rights in practice.

While Denmark maintains that the Copenhagen Principles are not intended to be legally binding and are without prejudice to states existing legal obligations, Amnesty International is concerned that states will nevertheless seek to rely on this document to justify abusive treatment or transfers of detainees to risks of such abuse. Some states already seek to rely on “diplomatic assurances” – non-legally-binding promises to treat a given individual appropriately -- to justify such transfers, including in some cases to states that are acknowledged to engage in widespread and systematic torture of detainees. Amnesty International is also concerned that Denmark has in the past suggested that the Principles could be appended to future resolutions of the UN Security Council under Chapter VII of the UN Charter, which could indirectly give them binding legal effect. States have already tried to argue in the past that their obligations under human rights treaties can be overridden or displaced by Chapter VII resolutions.

Disappointingly and worryingly, the five permanent members of the UN Security Council were among those states that participated in the Copenhagen Process, along with a number of other key contributors to international peacekeeping operations. Now that we see just how low a bar this group of states has self-servingly set for respect for human rights, it is not difficult to understand why they wished to hide their identities and their discussions away from the light of scrutiny by civil society organisations, the press, and the public these five years. It is deeply regrettable that rather than seizing the opportunity to call on states participating in joint military operations to harmonize towards the highest standards of respect for human rights, these states have instead diluted and obscured the fundamental role of human rights protections in such situations. At the end of a process that purported to aim at “ensuring humane treatment of detainees”, what has actually emerged is a framework that will at best be ineffective, and at worst could fundamentally damage respect for human rights.

Denmark made a few changes to the Principles in response to the limited input the handful of civil society organisations were able to give at the last-minute meeting on 16 October. While these changes did not go nearly far enough, they do demonstrate that states may be more sensitive to public scrutiny now that the secretive Copenhagen process has finally been exposed to the light of day. It is then all the more important that states, including particularly those that were excluded from the process, international organisations and global civil society stand firm to oppose any attempt to exploit the Copenhagen Principles and Guidelines to further undermine human rights.